



1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000  
FAX 202.719.7040

7925 JONES BRANCH DRIVE  
MCLEAN, VA 22102  
PHONE 703.905.2000  
FAX 703.905.2020

www.wileyrein.com

RECEIVED  
FEC MAIL CENTER

2008 NOV 24 PM 4:06

November 24, 2008

Jan Witold Baran  
202.719.7330  
jbaran@wrf.com

BY HAND

Ms. Thomasenia P. Duncan  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 6077 (U.S. Chamber of Commerce)

Dear Ms. Duncan:

This office represents the U.S. Chamber of Commerce ("Chamber") in the above-captioned Matter Under Review ("MUR"). This letter responds to the Complaint filed with the Federal Election Commission ("FEC" or "Commission") on September 24, 2008, by Brian Melendez on behalf of the Minnesota Democratic-Farmer-Labor Party that alleges coordination between the Chamber and a Senate campaign with regard to certain public advertising.

The Chamber denies coordinating its activities with any campaign. Furthermore, and as detailed below, the Complaint's general speculation that coordination may have occurred is insufficient to find reason to believe that the Chamber violated the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"). To the contrary, publicly available information about the firewalls implemented by a Chamber vendor – FLS Connect – not only undermines the Complaint's generalized coordination claims, but specifically and credibly refutes them. Accordingly, the Commission should find no reason to believe the Chamber violated the Act.

#### FACTS

On October 8, 2008, the Chamber received notice of a Complaint filed by Brian Melendez on behalf of the Minnesota Democratic-Farmer-Labor Party alleging that the Chamber paid for three television advertisements in Minnesota that "may have" been coordinated with Senator Norm Coleman in connection with his Minnesota reelection campaign to the United States Senate.<sup>1</sup>

<sup>1</sup> The Complaint describes the three ads as "attacking [Al] Franken's position on the Employee Free Choice Act," "attacking [Al] Franken's position on taxes," and "praising [Senator] Coleman's position on health care." The Complaint also provides web addresses where the ads can be viewed.

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2008 NOV 25 P 1:21

29044243583

Ms. Thomasenia P. Duncan

November 24, 2008

Page 2

The only nexus between the Chamber and Senator Coleman alleged in the Complaint is that the Chamber and the Senator's campaign committee are both listed as clients of the direct marketing firm FLS Connect at [www.flconnect.com](http://www.flconnect.com). The Complaint makes no mention of the fact that the same website states that FLS Connect maintains firewalls to avoid coordination.

Notably, the Complaint stops short of actually alleging that the Chamber's television advertising was, in fact, coordinated with the Senator. The strongest statements mustered by the Complaint are that the Chamber's and the Senator's separate retention of FLS Connect can support an "inference" and may be an "indicator[]" of coordination. Accordingly, the Complaint is left to conclude only that the advertising "may have" been coordinated and that the Commission "should investigate" whether any coordination actually occurred. The Complaint does not allege that coordination did occur.

The Chamber is an incorporated trade association that serves as the world's largest federation of business companies and associations with an underlying membership of over 3,000,000 businesses and business associations. The Chamber had retained FLS Connect to conduct phone calls to recruit additional members.

The Chamber provides various member services and advocates a pro-business agenda in all branches of the federal government on behalf of its members. These activities make the Chamber an appealing target for politically-motivated complaints filed with the FEC. *See, e.g.,* FEC Matter Under Review 5819 (dismissing complaint alleging impermissible corporate expenditures).

Complaints alleging improper coordination are particularly attractive to political complainants because of their speculative nature and, therefore, the ease with which they can be made. One of the namesake principals of FLS Connect was previously implicated in such a complaint. *See* FEC Matter Under Review 5546. However, the Commission voted 6-0 to dismiss that matter last year based on the results of the Office of General Counsel's investigation determining that:

FLS ... set up internal fire walls by assigning specific partners and employees to specific categories of clients such as federal candidates or political party committees or corporate and state/local clients ....  
[T]he structure was designed to prevent the partners and employees assigned to federal clients ... from

Ms. Thomasenia P. Duncan

November 24, 2008

Page 3

using information about those clients in connection with services provided to other clients or from conveying information about those clients to owners and employees who were assigned to other clients in violation of FECA and the Commission's regulations.

General Counsel Report #2 at 5 (Dec. 22, 2006) (internal quotations omitted). The Office of General Counsel concluded, and the Commission accepted, that this structure "prevented the transmittal of information." *Id.*

A thorough discussion of the FLS Connect firewalls now prominently appears on the FLS Connect website. The "About FLS Connect" page of the website, *available at* <http://www.flconnect.com/about.html>, devotes two of its four paragraphs to explaining that FLS Connect has structured its business so that it does not act as a conduit for coordination among its varied clients:

FLS Connect takes great care to ensure that we are organized to meet the requirements of the Bi-Partisan Campaign Reform Act (BCRA). With the help of our legal experts, we have developed an organizational structure and program process to ensure we are fully compliant with the BCRA laws. Our employees have gone through extensive compliance training and possess an in-depth understanding of what is acceptable as it relates to coordination. We have retained the services of the Washington law firm Patton Boggs LLP on an ongoing basis to assist in our effort to fully comply with the law. Our ability to separate our clients into sectors of business in compliance with BCRA allows us to effectively manage all of our clients' needs.

Our client list consists of the last five Presidential Campaigns and Bush/Cheney 2004. We also provide services for the Republican National Committee, the National Republican Senate Committee, the National Republican Congressional Committee, and hundreds of Republican State Parties and candidates on all

Ms. Thomasenia P. Duncan

November 24, 2008

Page 4

levels, as well as corporations, associations and other organizations.

Undeterred by the foregoing, Mr. Melendez nonetheless filed the Complaint in this matter. This is not the first time Mr. Melendez has filed a dubious complaint with a government authority. He previously tried and failed – multiple times – earlier this year to institute state administrative proceedings against sponsors of other independent advertising in Minnesota featuring Senator Coleman and Al Franken.<sup>2</sup> These attempts failed because, like the Complaint here, Mr. Melendez did not and could not allege facts sufficient to allege a violation of the law.

#### THE ACT AND IMPLEMENTING REGULATIONS

As a corporation, the Chamber is prohibited from making “contributions” to candidates for federal office. 2 U.S.C. § 441b. The Commission’s regulations explain: “Any person who is otherwise prohibited from making contributions ... is prohibited from paying for a coordinated communication.” 11 C.F.R. § 109.22. A communication will be deemed a coordinated communication if it satisfies three criteria. *Id.* § 109.21(a). There is no dispute that the Chamber’s ads satisfied the first two criteria which require, in relevant part, that the communication:

Is paid for, in whole or in part, by a person other than  
[a] candidate, authorized committee, or political party  
committee [and]

refers to a clearly identified House or Senate  
candidate and is publicly distributed or otherwise  
publicly disseminated in the clearly identified  
candidate’s jurisdiction 90 days or fewer before the

<sup>2</sup> See *Brian Melendez v. Minnesotans for Employee Freedom*, 11-0320-19806-CV, Minn. Office of Admin. Hearings (July 29, 2008) (dismissal for failure to present prima facie evidence of a violation) available at <http://www.oah.state.mn.us/aljBase/032019807.dismissal.htm>; *Brian Melendez v. Rhonda Bantz*, 11-0320-19807-CV, Minn. Office of Admin. Hearings (July 29, 2008) (dismissal for failure to present prima facie evidence of a violation) available at <http://www.oah.state.mn.us/aljBase/032019806%20dismiss%20or.htm>; *Brian Melendez v. Minnesotans for Employee Freedom*, 11-0320-19823-CV, Minn. Office of Admin. Hearings (Aug. 18, 2008) (dismissal for failure to present facts to support a finding of probable cause of a violation) available at <http://www.oah.state.mn.us/aljBase/032019823.dismissal.or.htm>.

Ms. Thomasenia P. Duncan

November 24, 2008

Page 5

clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

*Id.* § 109.21(a)(1), (b)(4)(i). The relevant provisions of the third criterion, the so-called "conduct standards," also follow:

(d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration...:

(1) *Request or suggestion.* (i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) *Material involvement....* A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

29044243587

Ms. Thomasenia P. Duncan  
November 24, 2008  
Page 6

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion....* The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor ... to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

29044243588

Ms. Thomasenia P. Duncan

November 24, 2008

Page 7

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) ... That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is

29044243589

Ms. Thomaseria P. Duncan

November 24, 2008

Page 8

material to the creation, production, or distribution of  
the communication.

*Id.* § 109.21(d).<sup>3</sup>

However, these “conduct standards” are not satisfied if a commercial vendor through which coordinating information might pass has “established and implemented a firewall” unless “*specific information* indicates that, despite the firewall, information about the candidate’s ... campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.” *Id.* § 109.21(h) (emphasis added).

The Commission stated in the accompanying Explanation & Justification to this regulation that “[m]any commenters also supported a firewall safe harbor as a way for organizations to respond to speculative complaints alleging coordination.” 71 Fed. Reg. 33190, 33206 (June 8, 2006). Accordingly, the Commission titled the regulation “*Safe harbor for establishment and use of a firewall*” and explained that it will also evaluate coordination claims made in the “safe harbor” context as follows:

In an enforcement context, the Commission will weigh the credibility and specificity of any allegation of coordination against the credibility and specificity of the facts presented in the response showing that the elements of the safe harbor are satisfied.

*Id.* at 33206-07.

<sup>3</sup> There are two other “conduct standards” contained in the Commission’s regulations entitled “*Former employee or independent contractor*” and “*Dissemination, distribution, or republication of campaign material*,” neither of which are implicated by the Complaint or otherwise apply.



Ms. Thomasenia P. Duncan  
November 24, 2008  
Page 9

## DISCUSSION

### 1. The Complaint Does Not Allege an Actual Violation of the Law, Much Less Sufficient Facts to Support Such an Allegation.

The Complaint does not allege that a violation of the law was committed. Instead, the Complaint is styled as a request that the FEC investigate whether a violation "may have" occurred based on "inference[s]" and "indicators," but not facts. Unsubstantiated requests to investigate must be dismissed at the threshold because they do not provide facts that can serve as a basis for a "reason to believe" finding.

As a statutory matter, a complaint upon which the FEC may act must be filed by a "person who believes a violation ... *has occurred*." 2 U.S.C. § 437g(a)(1) (emphasis added). The Commission's regulations further explain that a complaint "should contain a clear and concise recitation of the facts which describe a violation" and that the "complaint should differentiate between statements based upon personal knowledge and statements based upon information and belief." 11 C.F.R. § 111.4(c), (d)(3).

Armed with only "inference[s]" and "indicators," the Complaint falls short of alleging a violation of the law even "upon information and belief." Rather, the Complaint is left to conclude only that a violation "may have" occurred and does not allege that one actually "has occurred" as required by statute.<sup>4</sup>

The sole fact alleged in the Complaint that links the Chamber to Senator Coleman, and serves as the basis for the "inference[s]" and "indicators" that the Chamber coordinated its advertising with him, is language from the website of a vendor that lists both as clients. This, without more, does not amount to coordination.

The Complaint correctly states that coordination can be established between a candidate and a third party if they share a common vendor.<sup>5</sup> However, that vendor

<sup>4</sup> This omission is meaningful. The statute requires that a complaint "shall be made under penalty of perjury." 2 U.S.C. § 437g(a)(1). Given the absence of any facts establishing a violation, a conclusion that a violation had, in fact, occurred could be the basis of a perjury charge. The Complaint carefully avoids that problem by not alleging an actual violation.

<sup>5</sup> The Complaint cites to 11 C.F.R. § 100.26(d)(4) when referring to the common vendor component of the coordination "conduct standards." We are assuming it meant to cite to 11 C.F.R. § 109.21(d)(4).

Ms. Thomasenia P. Duncan

November 24, 2008

Page 10

must be one that assists the third party "to create, produce, or distribute the communication." 11 C.F.R. 109.21(4)(i). FLS Connect was retained by the Chamber to engage in membership recruitment phone calls and not to create, produce, or distribute the Chamber's television advertising in Minnesota. The Chamber filed Form 9 reports disclosing that other firms were retained to create, produce, and distribute its television advertising in Minnesota.<sup>6</sup> Furthermore, the existence of a common vendor does not, in and of itself, result in coordination. The coordination regulations still require that a common vendor actually transmit coordinating information from one client to another. See 11 C.F.R. § 109.21(d)(4)(iii). Accordingly, two of the three requirements for alleging coordination based on the common vendor "conduct standard" are not satisfied.

The Complaint also states that "[n]ewspaper articles describe a close-knit web of relations between Senator Coleman [and] the Chamber" which support "the inference" that the Chamber's advertisements "were produced at the request of Senator Coleman," "with Senator Coleman's material involvement, or after substantial discussion with Senator Coleman" pursuant to the coordination "conduct standards" at 11 C.F.R. § 109.21(d)(1)-(3). However, the newspaper article citations in the Complaint do not mention the Chamber or otherwise describe any relationship between Senator Coleman and the Chamber. Accordingly, they do not provide any factual basis for a coordination claim on these alternative grounds. In any event, the Chamber denies coordinating its television advertising with the Coleman campaign.

The Complaint only speculates that a violation "may have" occurred and invites the FEC to investigate. The Complaint's invitation is really an attempt to shift the minimal burden of alleging a violation and facts to support such an allegation to the

---

<sup>6</sup> One of the advertisements referred to in the Complaint was not subject to Form 9 reporting requirements. However, FLS Connect was not retained to create, produce, or distribute that advertisement either.

Notwithstanding the Chamber's Form 9 disclosures, the Complaint also claims that "the Chamber May Have Failed to Properly Report Their Expenditures." The Complaint appears to be suggesting that the Chamber was required to disclose coordinated expenditures in the manner required by political committees. Those reporting obligations do not apply because (1) the Chamber is an incorporated trade association, not a political committee; and (2) the Complaint fails to allege that the Chamber's advertising was coordinated, and this response demonstrates that it was not. To the extent the Chamber's independent advertisements qualified as electioneering communications, they were subject to disclosure on Form 9 which the Chamber timely filed.

Ms. Thomasenia P. Duncan

November 24, 2008

Page 11

Commission and to coax it into a fishing expedition not authorized by law. The Commission should not proceed further on this basis and the matter should be dismissed.

**2. The FLS Connect Website's Discussion of Firewalls Not Only Renders the Complaint's Unspecified Coordination Claims Insufficient, but Specifically and Credibly Refutes Them.**

The sole factual linkage between the Chamber and Senator Coleman provided by the Complaint is that, according to the FLS Connect website, both the Chamber and Senator Coleman are clients of FLS Connect. However, the FLS Connect website also explains that FLS Connect has implemented firewalls to avoid coordination among its clients thereby invoking the protections of the Commission's regulatory "safe harbor." These protections are twofold. First, they require that a complaint alleging coordination provide "specific information" that the firewalls have been breached. Second, the Commission must "weigh the credibility and specificity" of the allegations in the Complaint against the facts provided by the response. The Complaint in this matter falls short in both respects.

First, the Complaint does not contain any "specific information" about the failure of the FLS Connect firewalls. Second, a previous FEC investigation specifically examined and approved the firewalls at issue there which makes the statements about FLS Connect's firewalls on its website eminently credible. Conversely, the Complaint contains only unspecified coordination claims that have very little credibility in light of Mr. Melendez's history of filing similarly baseless complaints in other matters. Accordingly, the Complaint does not overcome the protections of the firewall "safe harbor" and should be dismissed on these grounds as well.

**(a) The Complaint's unspecified coordination claims are insufficient when alleging coordination in light of the FLS Connect firewalls.**

As previously explained, the Commission's regulations permit a common vendor to establish firewalls between clients to avoid coordination. *Id.* § 109.21(h). Doing so results in a "safe harbor" that serves as a first line of defense against speculative coordination claims. 71 Fed. Reg. at 33206. However, the "safe harbor" will not apply if "specific information indicates" that the firewall did not prevent the flow of coordinating information. 11 C.F.R. § 109.21(h).

29044243593

Ms. Thomasenia P. Duncan

November 24, 2008

Page 12

The FLS Connect website explains that the company has availed itself of this “safe harbor” by implementing firewalls to prevent coordination. Not only does the Complaint neglect to acknowledge the existence of the FLS Connect firewalls – a fact that is incomprehensible given the thorough treatment of the firewalls on the FLS Connect website and the Complaint’s singular reliance on the same – the Complaint does not provide any information, “specific” or otherwise, about how the firewalls may have been compromised.

The Commission should not permit an investigation to proceed based on a complaint that fails to provide the requisite “specific information.” If it does, the protections afforded by the “safe harbor” will be rendered useless because every vendor and client that relies on anti-coordination firewalls will be vulnerable to an investigation by the FEC based on speculative coordination claims. This is precisely the result the Commission sought to avoid when it promulgated this “safe harbor” regulation. See 71 Fed. Reg. at 33206.

(b) The credibility and specificity of the Complaint are outweighed by FLS Connect’s representations about its firewalls.

The Commission has also explained that, “[i]n an enforcement context,” it will “weigh the credibility and specificity of any allegation of coordination against the credibility and specificity of the facts presented in the response showing that the elements of the safe harbor are satisfied.” *Id.* at 33206-07. As has been previously explained, the Complaint fails to provide any specificity regarding its coordination claims. It relies solely on statements from the FLS Connect website that the Chamber and Senator Coleman are clients of FLS Connect and, therefore, “may have” coordinated their activities through FLS Connect. In contrast, the FEC’s investigation in MUR 5546 resulted in an examination and conclusion that the elements for an effective safe harbor had been satisfied. That conclusion appears to be the factual basis for the representations on the FLS Connect website that FLS Connect has implemented legally sufficient firewalls. Accordingly, the Complaint’s coordination claims are far less specific than the facts regarding the FLS Connect firewalls.<sup>7</sup>

<sup>7</sup> The Factual and Legal Analysis in MUR 5546 that formed the basis for the Commission’s finding that there was reason to believe – in that matter – that FLS satisfied the common vendor component of the coordination “conduct standards” was issued prior to the promulgation of the Commission’s firewall “safe harbor” regulation. As a result, the Factual and Legal Analysis relied

Ms. Thomasenia P. Duncan  
November 24, 2008  
Page 13

In addition, FLS Connect's representations about its firewalls are also far more credible than the Complaint's coordination claims given the Commission's previous examination and conclusion in MUR 5546. On the contrary, Mr. Melendez's consistent pattern of filing factually deficient complaints with government agencies strongly suggests that this Complaint, like his others, was motivated by a desire to generate negative publicity and not out of any genuine belief that the law was violated. The Complaint's weak assertion that a violation "may have" occurred, as opposed to stating under penalty of perjury that a violation did, in fact, occur is further evidence that Mr. Melendez does not actually believe a violation was committed, but filed the Complaint for purely political purposes. Accordingly, Mr. Melendez's Complaint should not be afforded any credibility.

#### CONCLUSION

The Complaint does not allege a violation of the law. Even if it did, the Complaint does not allege specific and credible facts that can overcome the firewall "safe harbor" that has been invoked in this matter. These deficiencies notwithstanding, the Chamber denies coordinating its television advertising with Senator Coleman or his campaign. Accordingly, there is no reason to believe a violation occurred and

---

(Continued . . .)

on language from a January 3, 2003, Explanation and Justification that was superseded by the Commission's firewall "safe harbor" regulation. Based on the superseded language, the Factual and Legal Analysis at 9 concluded: "Because the first two parts of the 'common vendor' test are met, there is a sufficient basis to investigate whether the use or exchange of information occurred as described in 11 C.F.R. § 109.21(d)(4)(iii)."

This conclusion can no longer support a coordination claim made in the firewall "safe harbor" context. 11 C.F.R. § 109.21(h) now requires that a complaint allege "specific information" that a firewall has been compromised before the Commission can find that there is reason to believe coordination occurred and to proceed with an investigation. The absence of information is no longer adequate to justify an investigation as it was in MUR 5546. And as just explained above, the inquiry does not end there. The Commission must also "weigh the credibility and specificity" of the complaint against the facts provided by the response before proceeding.

Ms. Thomasenia P. Duncan  
November 24, 2008  
Page 14

this matter should be dismissed.

Sincerely,



Ian Witold Baran  
Caleb P. Burns

29044243596